No. 90-1038

(12)

In The

Supreme Court of the United States

October Term, 1990

THOMAS CIPOLLONE, Individually and as Executor of the Estate of Rose D. Cipollone,

Petitioner,

v.

LIGGETT GROUP, INC., a Delaware Corporation; PHILIP MORRIS INCORPORATED, a Virginia Corporation; and LOEW'S THEATRES, INC., a New York Corporation,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF *AMICUS CURIAE* OF TRIAL LAWYERS FOR PUBLIC JUSTICE, P.C. IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE

Trial Lawyers for Public Justice, P.C. ("TLPJ"), is a national public interest law firm devoted to representing victims of corporate and government abuse. TLPJ is supported by and utilizes the services of more than 900 trial lawyers throughout the United States, and has represented many plaintiffs in cases against manufacturers of dangerous products. TLPJ is the only public interest law firm in the nation dedicated to the preservation of the

states' individual tort systems as the surest, and often sole, means of compensation to victims injured, or the survivors of those killed, by defective products.

In view of TLPJ's commitment to preservation of the nation's tort system, TLPJ has participated, as primary or as *amicus* counsel, in numerous state and federal trial and appellate courts in cases in which the preemption doctrine was a pivotal issue. As in these previous cases, the manufacturers of the dangerous products involved in this action seek to abrogate our tort system through misapplication of the preemption doctrine.

TLPJ seeks to bring to the Court's attention the recent tendency by lower courts to use preemption doctrine in the service of what are transparently tort policy views. In the process, tenets of preemption are forgotten. TLPJ will urge the Court to return the courts to rigorous preemption analysis in line with traditional presumptions. We believe this will vindicate the crucial role of the states' tort systems in compensating victims of dangerous products, and will restore to the analysis the touchstone inquiry into Congressional intent.

SUMMARY OF ARGUMENT

Preempting state tort law in an area of traditional state control, in the absence of a parallel remedy, and in reliance on a speculative "conflict" with federal interests, the decision below strips preemption from its traditional analytical moorings. Under the Third Circuit's decision, and other recent holdings in the product liability field,

the basic inquiry into Congressional intent, and the presumptive viability of state law in the health and safety area, have been discarded. Instead, preemption has become a device for effectuating tort policy goals.

If the proper inquiry into intent is made, however, it is seen that there are several reasons why Congress chose to preempt state regulation, but not tort law, in the Cigarette Labeling Act. First, regulatory law and tort law serve different ends. The former seeks to change conduct; the latter operates primarily to compensate victims of conduct. It is difficult to believe that Congress would vitiate tort law absent some other mechanism to accomplish its main purpose. Moreover, any incidental "regulatory effect" of tort law is to be tolerated under this Court's precedents.

Second, while regulatory law works by limiting the operation of the product marketplace, tort law is a part of the marketplace. That Congress sees fit, from time to time, to abolish conflicting state regulations – which would interfere with the collective legislative choice – does not mean that Congress would also alter the inner workings of the marketplace. Tort law is only one of many factors influencing manufacturers' product costs, and, as its "message" is inherently indistinct, its effect in no sense can be said to be "regulatory" in the same external way regulations are.

We submit that, far from endeavoring to ascertain and adhere to Congress' intent, the lower courts finding preemption in products liability cases are simply using the doctrine to defeat claims in which a defendant has a viscerally attractive argument that there should be no

liability in the face of compliance with government standards. Fortunately, however, traditional tort doctrine accommodates this concern. The Court should stop the conversion of preemption doctrine into tort doctrine. Much of the transformation is facilitated in lower courts by ritualistic reference to this court's statement in a vastly different, jurisdictionally-demarcated context that tort suits can have a regulatory effect. The holding in which that statement came has been applied narrowly by this Court. Moreover, this Court's preemption holdings, in situations much more analogous to that here, honor the traditional viability of state compensation law. Much mischief has occurred, however, in the products liability area by the lower courts' misapplication of the statutory language.

This Court should put a stop to that mischief, and hold that only an unequivocal declaration by Congress and the existence of a parallel remedy will justify a finding of preemption. Such a result will reaffirm the nature of preemption analysis as an inquiry into legislative intent, and will uphold the role of Congress – not the courts – as the architects of the balance of federal and state powers.

ARGUMENT

I. THE RULING BELOW REPRESENTS AN UNPRECEDENTED EXTENSION OF PREEMPTION DOCTRINE.

The parties undoubtedly will detail the contours of the preemption doctrine, and the standards for finding displacement of state law. We will focus on the reasons Congress reasonably preempted state regulation but not

tort law, and on the principle that tort liability is not preempted absent an unequivocal declaration and a parallel remedy. At the outset, however, we urge the Court to recognize the unprecedented extension of preemption doctrine represented by the ruling before it. The Third Circuit has removed tort liability in an area of traditional state primacy, has left no other remedy for those affected, and has relied on an entirely speculative "conflict" with federal interests.

The Cigarette Labeling Act touches directly, indeed explicitly, on the field of public health and safety, and therefore regulates in an area of traditional state control. *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 719 (1985). There is then, of course, a strong presumption against preemption: "we are not to conclude that Congress legislated the ouster of [a state] statute . . . in the absence of an unambiguous congressional mandate to that effect." *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 146-47 (1963).[1]

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[1] The New Jersey Supreme Court recently quoted to like effect Solicitor General Starr, who in turn quoted Justice Frankfurter:

> We are persuaded by the view most forcefully stated by Solicitor General Kenneth Starr, in his unpublished monograph "The Law of Preemption," that "[o]ur federal system, with its high regard for the several States' powers of governance requires that judges not preempt state law lightly." *Id.* at 61. Judge Starr recalls Justice Frankfurter's observation that when the Supreme Court considers whether Congress has preempted state law, "[a]ny indulgence in construction should be in favor of the States,

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The holding below also leaves those affected by the cigarette manufacturers' allegedly tortious conduct without any remedy. Here, too, the opposite conclusion is presumed: "It is difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct." *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251 (1984).

The speculative nature of a "conflict" between tort liability and the federal labeling standard is detailed in Part II below, in a discussion of why the preservation of state compensation law as a counterpart to federal regulation makes sense. The historic boundaries of preemption, and the presumptions which grow out of and embody basic principles of federalism, will be treated exhaustively by the parties. We submit, however, that this Court has never found preemption in circumstances such as these, and that affirmance will signal a radical transformation of preemption analysis from an examination of Congressional intent, protective of our federalist system, to an unfettered exercise in judicial activism, permitting the wholesale displacement of the traditional powers of the states.

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because Congress can speak with drastic clarity whenever it chooses to assume full federal authority." *Id.* at 86 (quoting *Bethlehem Steel Co. v. New York State Labor Relations Board*, 330 U.S. 767, 780, 67 S.Ct. 1026, 1033, 91 L.Ed. 1234-1249 (1947)).

Dewey v. R. J. Reynolds Tobacco Co., 121 N.J. 69, 94, 577 A.2d 1239, 1251 (1990) (holding cigarette claims not preempted). Solicitor General Starr's work is now published in K. Starr, P. Higginbothom, S. Seymour, W. Clark, J. Criswell & J. Sneed, The Law of Preemption: The Report of the Appellate Judges' Conference (ABA 1991).

II. THERE ARE STRONG REASONS WHY CONGRESS CHOSE TO PREEMPT STATE REGULATION BUT LEAVE STATE TORT LAW INTACT

The sole premise of the Third Circuit's holding that Congress must have intended to preempt state tort law as well as state regulation is the court's view that tort verdicts and state regulations are functionally equivalent. We believe the premise is incorrect, for regulatory law and tort law differ in several critically significant ways.

A. Regulatory Law and Tort Law Serve Different Purposes

Regulatory law and tort law serve different aims and in only the most attenuated sense can a tort verdict be said to equal a regulation. Under any standard preemption analysis, the distinctions between the two – if not the polarity – suffice for their coexistence.

Regulatory law's purpose is to change conduct. It is backed by the coercive force of government, and leaves no room for choice. Regulation addresses future behavior. Tort law, conversely, looks backward: its primary goal is to compensate victims of past conduct. *E.g.*, W. Prosser and P. Keeton, *Prosser & Keeton on Torts* §1 at 5, 7 (West 1984) ("[Tort law] is directed toward the compensation of individuals. . . . its primary purpose is to compensate for the damage suffered, at the expense of the wrongdoer.").

It is true that tort law can occasionally have an incidental effect on conduct, and this Court has noted the

possibility. *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 246-47 (1959). As discussed in Part IIIB below, *Garmon* has since been read narrowly by this Court; the point here is that needs served by tort law are different from those served by regulatory law, and as *Silkwood* emphasizes, it is difficult to believe that Congress would vitiate tort law absent some parallel mechanism for serving its main purpose – compensation. The Court has made this clear in several cases.

Silkwood drew on an earlier expression of the reluctance to infer preemption where remedies would be eliminated. In *United Construction Workers v. Laburnum Construction Corp.*, 347 U.S. 656 (1954), the Court wrote:

> Congress has neither provided nor suggested any substitute for the traditional state court procedure for collecting damages for injuries caused by tortious conduct. For us to cut off the injured respondent from this right to recovery will deprive it of its property without recourse or compensation. To do so will, in effect, grant petitioners immunity from liability or their tortious conduct. We see no substantial reason for reaching such a result.

Id. at 663-64. Later cases such as *English v. General Electric Co.*, ___ U.S. ___, 110 S.Ct. 2270 (1990), and *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174 (1988), both discussed in Part IIIA below, likewise apply *Silkwood* in finding state remedies viable even where state regulation is foreclosed. Regulatory law, the Court has noted, does not serve the same purpose as tort law. The wooden contention that preemption of state regulation means preemption of all state action in an area, regardless of purpose, has been rejected.

It is precisely for this reason – that regulatory law and other forms of state law do not serve the same purpose – that every appellate court to consider the issue has held that Congress did not intent to preempt state criminal prosecution simply because state regulatory law was preempted in the occupational safety and health field. The Occupational Safety & Health Act, 29 U.S.C. §651 et seq. (1982), prescribes standards in the workplace and penalties for their violation, and although state criminal prosecutions may tend to "regulate" more stringently, criminal law also serves the distinct purpose of punishment. The words of the Illinois Supreme Court are representative:

> Although the imposition of sanctions under State penal law may effect a regulation of behavior as OSHA safety standards do, regulation through deterrence, however, is not the sole purpose of criminal law. For example, it also serves to punish as a matter of retributive justice. Too, whereas OSHA standards apply only to specific hazards in the workplace, criminal law reaches to regulate conduct in society in general.

People v. Chicago Magnet Wire Corp., 126 Ill.2d 356, 263, 534 N.E.2d 962, 966 (1989).[2]

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[2] *See also Sabine Consolidated, Inc. v. State*, 806 S.W.2d 503 (Tex. Crim. App. 1991); *People v. Pymm*, 76 N.Y.2d 511, 563 N.E.2d 1, 561 N.Y.S.2d 687 (1990); *People v. Hegedus*, 432 Mich. 598, 443 N.W.2d 127 (1989); *State ex rel. Cornellier v. Black*, 144

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Similarly, tort law and regulatory law aim in different directions. Indeed, criminal law and regulatory law are much closer conceptually; there is intuitively a much greater conduct-forcing character to criminal law. Nonetheless, it operates independently to federal regulation in the OSHA arena. Surely it makes sense for Congress to preempt state regulatory law, while leaving compensation law intact.

B. Regulatory Law Places Limits on the Operation of the Marketplace, while Tort Law is a Part of the Marketplace.

The marketplace in which products are sold, consumed, and cause injury and death works essentially by internalizing external costs. Social costs of products are imposed on manufacturers. Among other ways this occurs, tort verdicts impose the costs of injuries caused by products, and of course the costs are in turn spread by manufacturers to all consumers.[3] Occasionally, of course,

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Wis.2d 745, 425 N.W.2d 21 (1988); *Commonwealth v. Morris*, 394 Pa. Super. 185, 575 A.2d 582 (1990). All of these rulings preserve state criminal power in the occupational safety and health field.

[3] We are speaking here of the product marketplace in general. It should be noted that the cigarette market in particular is eminently suited to the normal operation of risk-spreading. Noting that over 600 billion cigarettes are sold each year in the United States, providing almost $30 billion in revenue, one commentator has written that "[t]here is no apparent reason to

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regulations are necessary to place limits on the operation of the marketplace, to ensure that a minimum level of safety is provided or make up for some perceived breakdown in market operations. *See generally G. Calabresi, The Costs of Accidents* 68-129 (1970).

When this happens, Congress might well see fit to prohibit conflicting regulations, because they would conflict with the collective choice made by it. Indeed, as the parties will detail, a number of state and local governments were contemplating cigarette warning requirements prior to the passage of the federal labeling act; an express aim of the act was and is maintenance of national uniformity.

It does not follow, however, that the inner workings of the marketplace itself would necessarily therefore be altered. State tort law – whether it imposes absolute liability for all injuries caused by a product, strict liability, or fault-based liability – reflects a local decision as to how, within prescribed limits, costs will be allocated by the market. The D.C. Circuit recognized as much when it held that a suit challenging the labeling on a pesticide was not preempted by the Federal Insecticide, Fungicide

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exempt cigarette manufacturers from their loss-spreading responsibilities. . . . Cigarette companies not only profit from the sale of an injury-causing product, but receive sufficient revenue from cigarette sales to enable them to pay substantial amounts of money for purposes of compensation." Ausness, *Cigarette Company Liability: Preemption, Public Policy, and Alternative Compensation Systems*, 39 Syracuse L.Rev. 897, 942-43 (1988).

& Rodenticide Act, which precludes states from imposing labeling "requirements":

> Even if Chevron could not alter the [EPA-approved] label, Maryland could decide that, as between a manufacturer and an injured party, the manufacturer ought to bear the cost of compensating for those injuries that could have been prevented with a more detailed label than that approved by the EPA.

Ferebee v. Chevron Chemical Co., 736 F.2d 1529 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1062 (1985).

Professor Ausness has written on the dichotomy between regulatory adjustment of the marketplace, and marketplace operation itself, as means of accident cost avoidance. He concludes that federal warning requirements do not preempt the general operation of market forces:

> Specific deterrence mandates a particular choice determined by the legislature or an administrative agency. . . . This was the type of state activity the Federal Cigarette Labeling & Advertising Act expressly prohibited. On the other hand, strict products liability is a classic example of general deterrence. It relies on market forces, not governmental coercion, to influence manufacturer behavior. Because of this fundamental difference between specific and general deterrence, it is difficult to see how federal legislation that preempted acts of specific deterrence by the states would necessarily preempt general deterrence measures as well.

Ausness, *supra*, at 927.

Tort law is only one of many factors that operate in the marketplace. The holding below, however, invests tort

law with an external, regulatory quality. This view of tort law not only ignores the distinct roles played by regulatory law and torts, but it also ascribes far too much effect to verdicts. The Third Circuit did not discuss in its original opinion how, or to what extent, tort verdicts drive manufacturers' behavior so much as to become requirements; it merely conclusorily referred to their "regulatory effect." *Cipollone v. Liggett Group, Inc.*, 789 F.2d 181, 187 (3d Cir. 1986), *cert. denied*, 479 U.S. 1043 (1987), on remand, 893 F.2d 541 (3d Cir. 1990), *cert. granted*, ___ U.S. ___, 111 S.Ct. 1386 (1991). While product liability law does influence safety choices, however, it sends an extremely vague signal. Several factors combine to weaken the verdict "signal."

First, because compensation, rather than injury prevention, is the primary purpose of tort law, tort proceedings are not ordinarily structured to provide specific guidance to manufacturers on precisely how to alter their conduct. For example, in a typical failure to warn case, the jury is asked to decide whether the manufacturer's conduct was negligent; it is not asked to decide what the manufacturer should have said. Thus, even if the manufacturer wanted to give the jury verdict "regulatory effect," it would often have trouble doing so. This is, of course, even more true of those cases which are resolved without trial – over 90% of tort cases.

Second, even in those instances in which it is clear what action the jury believes the manufacturer should take, it is by no means clear that the manufacturer will actually take that action. Unfortunately, manufacturers

often maximize short-term profits and fail to take appropriate steps to protect the public, even when jury verdicts urge them to do otherwise.

It is simply not true, therefore, that tort claims automatically equal regulation in their effect. Cases years apart underscore the fact: 13 years ago, the Tenth Circuit upheld an award of $650,000 to the plaintiffs in *Fox v. Ford Motor Co.*, 575 F.2d 774 (10th Cir. 1978), for deaths caused, inter alia, by Ford's failure to install rear seat shoulder harnesses. Ford paid the money and made no changes; it did not install these cheap safety devices in all of its cars. Instead, it continued to pay individual victims. *See, e.g., Garrett v. Ford Motor Co.*, 684 F.Supp. 407 (D. Md. 1987) ($3.3 million verdict, reported in Wall St. J., Dec. 21, 1987 at 25).[4]

Especially given the stricture against basing preemption on "hypothetical or potential conflict," *Rice v. Norman Williams Co.*, 458 U.S. 654, 659 (1982), tort liability does not frustrate federal regulation. The most recent court to consider preemption in the tobacco situation recognized as much:

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[4] It is worth noting that, in the above example, the potential "regulatory effect" was much greater than in the instant case, because the "signal" was clear: Ford knew exactly why it had to pay the award and what it should do to avoid paying similar awards in the future. In the warnings area, by contrast, the jury simply decides whether the warning was inadequate, but sends no clear message about its content. In such a situation, "regulation" is hardest to discern.

> In light of the manufacturers' options and the variables that influence their choices, it is simply not clear that common-law damage awards against cigarette manufacturers would result in the "diverse, nonuniform, and confusing cigarette labeling and advertising regulations" Congress sought to avoid through the Labeling Act. We conclude, therefore, that the potential conflict asserted by defendants is too speculative to warrant preemption.

Carlisle v. Philip Morris, Inc., 805 S.W.2d 498, 510 (Tex. App. 1991). Verdicts compensate, but they do not control behavior nearly enough to amount to regulation.

There is a final aspect of tort law's role in the marketplace that underscores its distinction from regulatory law and the wisdom of Congress in preserving its operation. Federal statutory law is relatively slow to change; tort law and the marketplace are fluid, responding far more quickly to changing conditions. It was wise for Congress to leave tort law in place, even while enacting federal regulatory law and preempting its state counterpart. The operation of tort law, through the marketplace, creates a built-in self-correcting mechanism that may prompt manufacturers to change their conduct in response to verdicts or, if that is prohibited by federal law, join together to seek a change in that law. *See Ferebee, supra*, 736 F.2d at 1541 ("Successful actions [challenging labeling] may lead manufacturers to petition EPA to allow more detailed labeling of their products; alternatively, EPA itself may decide that revised labels are required in light of the new information that has been brought to its attention through common law suits.").

C. Tort Law Accommodates the Visceral Problem of Liability in the Face of a Prescribed Warning.

Congress required a particular warning on all packages of cigarettes. Much of the motivation for recent preemption holdings in the products liability area comes from the reaction that it is essentially unfair to impose liability for an inadequate warning in the face of a prescribed warning. Though that is in reality a tort argument, not a preemption argument – preemption has to do with Congress's intent – the contention makes its way into preemption holdings. Thus, in a very recent case, the Eleventh Circuit held that suits challenging pesticide labels are preempted by the Federal Insecticide, Fungicide & Rodenticide Act, 7 U.S.C. §§136-136y (FIFRA) as long as the labels meet FIFRA requirements. *Papas v. Upjohn Co.*, 926 F.2d 1019 (11th Cir. 1991). One basis for the holding was the court's policy view, unsupported by any citation to that statute's language or legislative history, that a jury simply should not be permitted to disagree with the EPA as to whether a pesticide's label is adequate. The court baldly asserted that "a jury determination, via a state common law tort judgment, that a pesticide's labeling is inadequate results in a direct conflict with the EPA's determination that the labeling is adequate to protect against health risks." *Id.* at 1025.

Papas is only the most recent example of how judges' views of the merits of product liability claims infect preemption analysis. The same happens in cigarette cases. In *Palmer v. Liggett Group, Inc.*, 825 F.2d 620 (1st Cir. 1987), in addressing the argument that preemption does not normally occur when its effect would be to leave injured parties without a remedy, the court stated that "[f]irst,

cigarette smoking, at least initially, is a voluntarily activity." *Id.*, 825 F.2d at 627. While such a view may have force, it plainly has nothing to do with preemption.

This Court should stop the conversion of preemption doctrine into tort policy doctrine. While it may be a very sympathetic argument, the contention that government acceptance (or prescription) of a particular label excludes a tort challenge has nothing to do with preemption. The bedrock issue of preemption is a balance of powers. Whether state tort law *can* challenge a federally-approved level is entirely separate from whether state tort law *should*.

At bottom, a defendant's complaint is that it cannot be found negligent for doing no more than what the government required it to do. Not only is this plea unrelated to preemption, but fortunately, tort law itself also accommodates the concern. There is no need to press preemption doctrine into service to accomplish what is really a tort policy.

It is axiomatic that compliance with government standards is admissible to prove nondefectiveness or reasonable care. *See, e.g., Cornstubble v. Ford Motor Co.*, 178 Ill. App. 3d 20, 532, N.E.2d 884 (1988). Some jurisdictions go further, however, and mandate that compliance with standards is a *conclusive* defense to tort liability, *see* Montana Code Ann. §69-4-201 (1990), or that compliance establishes a rebuttable presumption of non-negligence. Kan. Stat. Ann. §60-3304(a)(1981); Ky. Rev. Stat. Ann. §411.310(2)(1978); N.D. Cent. Code §28-01.1-05(3)(1979); Utah Code Ann. §78-15-6(3)(1977); Colo. Rev. Stat.

§13-21-403 (1977). *See also* Model Uniform Product Liability Act §108(A).

Even when no presumptive or conclusive weight is given to compliance, the effect of adherence to minimum standards is, of course, very damaging to a tort claim. *See, e.g., Lorenz v. Celotex Corp.*, 896 F.2d 148 (5th Cir. 1990) (upholding instruction under Texas law that "compliance with government safety standards constitutes strong and substantial evidence that a product is not defective"); *Haynes v. American Motors Co.*, 691 F.2d 1268, 1274 (8th Cir. 1982) (upholding instruction that Ark. Stats. §34-2804(a), dictating that state compliance with federal regulations "shall be considered as evidence" of non-defectiveness, "provided a defense" to plaintiffs' claims).

In short, the visceral reluctance to impose liability in the face of the government warning is taken care of by tort doctrine. There is no need to use preemption doctrine to overcome this problem, and the Court should put a stop to the tendency. Preemption doctrine addresses the relations between Congress and the states. Tort law will take care of any fairness concerns.

III. THE COURT SHOULD MAKE CLEAR THAT TORT LAW IS NOT PREEMPTED UNLESS CONGRESS CLEARLY AND UNEQUIVOCALLY SAID SO AND A PARALLEL REMEDY IS AVAILABLE.

A. Speculative, Incremental Tort Liability Pressure is an Insufficient Basis for Preemption.

The parties will detail the extensive precedent of this Court to the effect that speculative, potential conflict

between state and federal law will not result in preemption. *See, e.g., Rice v. Norman Williams Co.*, 458 U.S. 654, 659 (1982) ("The existence of a hypothetical or potential conflict is insufficient to warrant the preemption of the state statute.") In finding preemption, however, the Third Circuit relied on three cases for the proposition that tort law can equal regulation. These cases are vastly different and are distinguished below. We first will briefly discuss the recent holdings of this Court that, while federal regulation may displace state regulation, state compensation law is not preempted, at least absent an unequivocal declaration.

Foremost, of course, and impossible to reconcile with *Cipollone*, is *Silkwood v. Kerr-McGee Corp., supra.* The parties will treat *Silkwood*, but the words of America's leading constitutional scholar bear repeating:

> The Third Circuit [in *Cipollone I*], in reading Congress' preemption language expansively, apparently found that Congress meant to exempt the tobacco industry from the choice, faced by manufacturers in virtually every other industry, among increasing product safety, increasing warnings, or paying damages to injured consumers. That holding seems hard to square with *Silkwood* and with the Supreme Court's admonition that there is an overriding presumption that "Congress did not intend to displace state law."

L. Tribe, *American Constitutional Law* 490-91 (2d ed. 1988).

Silkwood guided the result in a recent case in which the Court explicitly acknowledged that "the prospect of compensatory and punitive damages for radiation-based

injuries will undoubtedly affect nuclear employers' primary decisions about radiological safety in the construction and operation of nuclear power facilities. . . . " and reaffirmed its "teaching that '[o]rdinarily, state causes of action are not preempted solely because they impose liability over and above that authorized by federal law.' " *English v. General Electric Co.*, ___ U.S. ___, ___, 110 S.Ct. 2270, 2279-80 (1990), quoting *California v. ARC America Corp.*, 490 U.S. 93, 105 (1989).

The same point was made in *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174 (1988), in language that anticipates the present case:

> Congress' reluctance to allow direct state regulation of federal projects says little about whether Congress was likewise concerned with the incidental regulatory effects arising from the enforcement of a workers' compensation law, like Ohio's, that provides an additional award when the injury is caused by the breach of a safety regulation. The effects of direct regulation on the operation of federal projects are significantly more intrusive than the incidental regulatory effects of such an additional award provision. Appellant may choose to disregard Ohio safety regulations and simply pay an additional workers' compensation award if an employee's injury is caused by a safety violation. We believe Congress may reasonably determine that incidental regulatory pressure is acceptable, whereas direct regulatory authority is not.

Id., 486 U.S. at 185-86. Nonetheless, the Third Circuit strained to find preemption in indistinguishable circumstances.

Silkwood and its progeny teach that incidental pressure resulting from state compensation law does not rise to the level of "conflict" such that preemption obtains. These cases would seem to govern the present matter. The lower court relied on three very different cases, however, that properly viewed are inapposite.

Stating only that "several Supreme Court opinions reflect recognition of the regulatory effect of state law damage claims and their potential for frustrating congressional objectives," 789 F.2d at 187, the court first cited *Fidelity Federal Savings & Loan Assoc. v. de la Cuesta*, 458 U.S. 141, 156-59 (1982). *de la Cuesta* says nothing of the sort. There, federal law specifically empowered federal savings and loan associations, at their sole option, to include "due-on-sale" clauses in loan contracts, "subject only to express limitations imposed by the [Federal Home Loan Bank] Board." *Id.* at 155. California law required certain conditions to exist before such clauses could be used. *de la Cuesta* is a different case from the present one, then: there, state law specifically required what federal law disallowed: restrictions on the use of the clauses. Here, state law does not "require" anything (except perhaps, the payment of damages by a defendant that loses), and federal law has merely prohibited the states from ordering a stronger warning.

The more fundamental problem with reliance on *de la Cuesta* is that it says nothing about incremental tort liability pressure equaling regulation. "Regulatory effect" in *de la Cuesta* was not derived from damage claims, but rather from a specific state requirement which interfered with flexibility explicitly provided by federal law. The case simply does not discuss the hazy type of "conflict" at

issue here, and certainly provides no support – let alone any meaningful delineation of useful principle – for the "verdicts equal regulation" hypothesis.

The Third Circuit next cited *Chicago & North Western Transportation Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 324-25 (1981). Once again, the case presents a very different conceptual framework. The Interstate Commerce Commission has the sole power to decide whether railroad tracks can be abandoned; an Iowa statute prescribed penalties for abandonment potentially even in the face of ICC authorization. *Carlisle v. Philip Morris, Inc., supra*, 805 S.W.2d at 516, distinguishes *Kalo Brick* from the present situation, as the parties will undoubtedly discuss. What is important here is that like *de la Cuesta, Kalo Brick* affords no instruction on how verdicts can acquire the force of regulation: how many verdicts there must be, what kind and extent of effect on defendants' income must be demonstrated, whether compensatory as well as punitive awards are to be considered, etc. *Kalo Brick* is a simple, pure conflict case: the federal agency had granted permission to do what state law would question. There was no occasion in that case to examine the regulatory pressure of damage claims, because the case presented a straightforward, not hypothetical conflict.

The last case cited was *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 247 (1959), which has been used, quite cavalierly, by lower courts to work much unintended mischief outside of its narrow context. *Garmon* is distinct from *de la Cuesta* and *Kalo Brick* in that it does at least contain a statement that damage awards can have a regulatory effect. Nevertheless, the case, which

held that National Labor Relations Act provisions preempted an action for business losses from union picketing, is a thin reed upon which to base the elimination of tort remedies for defective products.

For one thing, preemption is presumed in cases in which the National Labor Relations Board is involved. *Brown v. Hotel & Restaurant Employees & Bartenders International Union Local 54*, 468 U.S. 491, 502 (1984); *see Dewey v. R. J. Reynolds Tobacco Co.*, 121 N.J. 69, 88, 577 A.2d 1239, 1248 (1990). The labor field contrasts with public health and safety, in which the presumption is against preemption. *Hillsborough County v. Automated Medical Laboratories, Inc., supra*, 471 U.S. at 719.

Placing *Garmon* at a further remove is the fact that state *jurisdiction* was displaced, because the facts possible came under National Labor Relations Board purview: when "activity is arguably subject to section 7 or section 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted." *Garmon, supra*, 359 U.S. at 245. If the regulated matter is so demanding of sole supervision as to be "jurisdictionally-definable," see L. Tribe, *supra* at 503, exclusion of state power seems natural. No one has ever contended that this is so with products liability law.

The preemption holding in *Garmon* has been narrowly applied in its own field. *See, e.g., Farmer v. United Brotherhood of Carpenters*, 430 U.S. 290, 302 (1977) ("[I]nflexible application of the [*Garmon*] doctrine is to be avoided, especially where the State has a substantial

interest in regulation of the conduct at issue and the State's interest is one that does not threaten undue interference with the federal regulatory scheme."); *Breininger v. Sheet Metal Workers International Assoc. Local Union No. 6*, 493 U.S. 67 (1989) (employee's suit against union for hiring-hall discrimination not preempted because courts have doctrinal expertise in fair representation matters and because the compensation interest is paramount and cannot be assured by the National Labor Relations Board). The opinion has had a second career, however, in the products liability area, as it has been used to justify preemption by lower courts in several cases – but the employment has come more through ritual incantation than reasoned application.

The transformation of *Garmon* into a wondrous shield against ordinary products liability claims began in the case below, with absolutely no analysis. The ritual language was repeated in *Palmer v. Liggett Group, Inc., supra*, again with no analysis, or comparison of *Garmon*'s setting and the products liability setting. *Garmon* unfortunately lends a veneer of legitimacy to astonishing statements like that of Judge Brown:

> If a manufacturer's warning that complies with the Act is found inadequate under a state tort theory, the damages awarded and verdict rendered against it can be viewed as state regulation: the decision effectively compels the manufacturer to alter its warning to conform to different state law requirement as "promulgated" by a jury's findings.

Id., 825 F.2d at 627. It should not be necessary to respond that juries do not promulgate requirements, but *Garmon* has allowed such language to gain credence.

One year after *Palmer*, the First Circuit decided *Wood v. General Motors Corp.*, 865 F.2d 395 (1st Cir. 1988), *cert. denied*, ___ U.S. ___ (1990), in which it held that suits challenging the lack of airbags in cars are preempted. The court simply quoted the magic language, and also referred in a footnote to "the *Garmon* reasoning that tort suits have a regulatory effect." *Id.*, at 411 n.18. Similar use of *Garmon* was made in *Pennington v. Vistron Corp.*, 876 F.2d 414, 420 (5th Cir. 1989) (holding tobacco warnings claims preempted and stating only that "state tort liability can have a regulatory effect that may conflict with a federal statute or frustrate congressional objectives. . . "), and *Taylor v. General Motors Corp.*, 875 F.2d 816 (11th Cir. 1989), in which the language conferring regulatory status on tort verdicts, which now is routinely recited in order to facilitate preemption, was relegated to a footnote. *Id.*, at 824 n.16.

The problem in these cases, and most certainly in the case under review, is that we are told nothing about the effect. How much effect? Does the "effect" come from suits being filed, from verdicts, from verdicts over a certain size, or from something else? Does it come only from punitive verdicts, or from compensatory ones as well?

Moreover, these cases seem to lose track of the fact that what is preempted is state "requirements." Even if financial effect is accorded to verdicts, such additional product costs simply do not equal a requirement – unless that word has lost all meaning.

In short, it is not enough simply to intone that verdicts equal regulation. If preemption is to be based on

"conflict" or "frustration" – and if the cases that hold against preemption based on speculative conflict really mean anything – we must know how the conflict occurs.

Garmon was not concerned with answering these questions, because preemption there took on a jurisdictional dimension: Congress had delegated to the NLRB exclusive cognizance of such labor disputes. In contrast, it is hard to imagine an area more traditionally state-managed than compensation for product injuries. *Garmon* simply does not tell us, in any meaningful articulation of decisional principle, how verdicts become requirements. This Court should restore the language of *Garmon* to its context, and undo the mischief caused by its careless application in the lower courts.

B. Tort Law is Preempted Only When it Actually and Directly Conflicts with Federal Law.

Instead of finding conflict in the gossamer "effect" of verdicts, state tort law should be deemed preempted only when it actually and directly conflicts with federal law. The sense of this case, at bottom, is that Congress merely required some minimum information to be imparted to cigarette purchasers. It is doubtful that Congress meant to *forbid* a manufacturer from putting a more detailed warning on a pack of cigarettes, much less to forbid the states from enforcing their general tort law principles to compensate cigarette victims. If tort law somehow precluded compliance with the minimum Congressional directive, it would then quite easily be preempted – but that is not this case.

The present case is the reverse situation. Here, a state jury would simply require a tobacco company to pay for the death its product caused, concluding that more information should have been passed on, but would not force any change in the product, its label, or its advertising, and certainly would not preclude compliance with the federal mandate. Or, perhaps the jury would conclude that the company had not been negligent, or that the minimum warning was adequate, because after all it was the warning Congress required. The point is that federal law would not be interfered with by whatever the jury does.

Refusing to base preemption on speculative conflict is not a novel approach; rather, it comports much more with traditional preemption analysis than do the recent transparent opinions in the products area. Insisting on real, certain conflict preserves the supremacy of the regulatory interests of Congress, but displaces state compensation functions only to the extent necessary to serve those interests.

In a larger view, requiring some actual conflict to be present preserves the correct balance of federal and state hegemony, and more fundamentally preserves the role of Congress in calibrating the balance. State governance is "more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power." *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 552 (1985). As Professor Tribe has written, *Garcia* dictates that "decisions restricting state sovereignty be made in a deliberate manner by Congress, through the explicit exercise of its lawmaking power to that end. . . . But to give

the state-displacing weight of federal law to mere Congressional *ambiguity* would evade the very procedure for lawmaking on which *Garcia* relied to protect states' interests." L. Tribe, *supra* at 480 (emphasis in original).

Groping for preemption in the absence of Congressional dictates is an exercise which does not further these ends. This is especially so where the exercise is so clearly in the service of judges' policy views. The use of preemption as a surrogate for tort policy must cease.

In writing of the evolution, in another area, of doctrine away from its underlying policy, Professor Robertson has stated:

> Legal doctrine always seeks to reflect and implement some governmental policy. It achieves its purposes when it is an accurate reflection of that policy and when it provides a readier basis for decision (or for explanation of decision) than the policy standing alone. But unless the underlying policy is kept firmly in mind and the developing doctrine continually checked against it, doctrine tends to proliferate and take on a life of its own.

Robertson, *A New Approach to Determining Seaman Status*, 64 Tex.L. Rev. 79, 84-85 (1985).[5]

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[5] This Court cited the quoted article this term in *McDermott International, Inc. v. Wilander*, ___ U.S. ___, 111 S.Ct. 807, 112 L.Ed.2d 866, 882 (1991), in which the "confusion" caused by the "wayward case law" on seaman status was eliminated by returning the doctrine to its original motivating foundation: seaman's remedies should be accorded all those who face the particular perils of the sea in the service of vessels.

If the result below is upheld, it is hard to see where preemption stops. If it occurs in a traditionally state-governed field, based on speculation, and leaving no remedy, preemption will truly have taken on a life of its own.

CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded for further proceedings.

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